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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA MANCERA,

Defendant and Appellant.

D074636

(Super. Ct. No. SCS302397)

APPEAL from a judgment of the Superior Court of San Diego County, Dwayne K. Moring, Judge. Affirmed.

Patricia M. Ihara and Jill M. Kent, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Kristen Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

As part of a plea bargain, Joshua Mancera pled guilty to one felony count of carrying a concealed dirk or dagger (Pen. Code, § 21310) and one misdemeanor count of

possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The trial court granted him probation subject to certain conditions, including that he submit his electronic devices to warrantless searches. On appeal, Mancera contends this provision is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and unconstitutionally overbroad. We conclude (1) the condition passes muster under *Lent*, and (2) Mancera failed to preserve his constitutional overbreadth challenge by failing to object on that basis at sentencing. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

In July of 2018, police officers contacted 20-year-old Mancera after they suspected he was using drugs in public. Mancera identified himself truthfully, but falsely denied he was on probation. A records check revealed his true probationary status, and a subsequent search revealed he had a 10-inch knife in his waistband, and .36 grams of heroin and .04 grams of methamphetamine in his pants pocket.

Mancera was arrested and charged with one felony count of carrying a concealed dirk or dagger (Pen. Code, § 21310), and one misdemeanor count each of unlawfully possessing heroin (Health & Saf. Code, § 11350, subd. (a)) and unlawfully possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)). After initially pleading not guilty, Mancera entered into a plea bargain under which he pled guilty to the weapon-possession and methamphetamine-possession charges, in exchange for dismissal of the heroin-possession charge and a stipulated probationary sentence that included 60 days in

¹ We base our factual summary on the probation officer's report.

custody, to run concurrently with a stipulated 240-day custodial term on his prior convictions for which he was on probation at the time of the instant offenses.

The probation officer prepared a report for the court's use at sentencing. The report included Mancera's self-reported history of marijuana and heroin use beginning at age 17. Mancera admitted daily heroin use and weekly methamphetamine use in the period before his arrest on the instant offenses. He told the probation officer he had "never participated in a substance abuse treatment program and does not believe one is necessary."

The report also described Mancera's criminal history. About five months before his arrest on the instant offenses, Mancera pled guilty to felony counts of reckless evasion (Veh. Code, § 2800.2, subd. (a)) and unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)). He was placed on three years' formal probation and "ordered to serve 180 days on CPAC."² Mancera was scheduled to report for CPAC about six weeks after sentencing, and to report to his probation officer periodically in the meantime. Mancera failed to report for one of his interim check-ins. When his probation officer told him to report the next day, Mancera again failed to do so. He also failed to appear for his CPAC

² The San Diego County Sheriff's Department website describes CPAC as follows: "The County Parole and Alternative Custody Unit (CPAC) was created to provide alternative custody programs. These programs include County Parole, Fire Camp, Home Detention, and Residential Reentry Center/Work Furlough with electronic monitoring. These programs are designed to socially reintegrate offenders through continued treatment and other required programming with a proactive supervision method. This method of supervision is designed to place the CPAC staff in contact with participants so that the goals and objectives of community safety, security, and reintegration can be achieved." (<https://www.sdsheriff.net/cpac.html> <as of July 22, 2019>.)

report date. Mancera later returned to court and was ordered to report to CPAC in about one month. He again failed to report as ordered. The court issued an arrest warrant, and Mancera was arrested on the instant charges two days later.

The probation report summarized the findings of a "research based risk and needs assessment," which determined Mancera "would benefit from some guidance and monitoring in the community via supervision by Probation" Accordingly, the probation officer recommended "all general conditions of probation," as well as "drug conditions," "[a]lcohol conditions," and, "[i]n order to properly supervise him and ensure his compliance on probation, a Fourth Waiver . . . , to include cell phones." Specifically, the probation officer recommended a condition requiring Mancera to "[s]ubmit person, vehicle, residence, property, personal effects, computers, and recordable media [and] cell phones to search at any time with or without a warrant, and with or without reasonable cause, when required by P.O. or law enforcement officer" (hereafter, the electronics-search condition). The probation officer reviewed the proposed conditions with Mancera, who "agreed to comply with any orders imposed by the Court."

At the sentencing hearing, the following exchange occurred between the court and counsel regarding the electronics-search condition:

"[THE COURT:] I have read the probation report. Probation is recommending that he be placed on formal probation and sentenced to standard terms.

"[DEFENSE COUNSEL:] And, [y]our Honor, if I can just be heard as to one term of probation here.

"THE COURT: Yes.

"[DEFENSE COUNSEL]: . . . Your Honor, there is no nexus for a Fourth waiver that involves search of his cell phone. [¶] He pled to possession of a controlled substance, which is methamphetamine, and carrying a concealed dirk or dagger. [¶] . . . [¶]

"[PROSECUTOR]: That is a standard condition, [y]our Honor, especially when there is narcotics involved so that probation can assist them with treatment and make sure that they are not involved in any further illegal activity. [¶] . . . [¶]

"THE COURT: I will find there is sufficient nexus in light of the drug use. So I will order that term." (Bolding omitted.)

The court placed Mancera on three years' formal probation subject to various conditions, including the electronics-search condition. Mancera acknowledged at sentencing that he reviewed the conditions with his attorney and accepted them.

DISCUSSION

Mancera challenges the electronics-search condition on *Lent* and constitutional overbreadth grounds. Similar issues are currently pending before the California Supreme Court in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923, and many other cases, including this court's decisions in *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*), review granted November 29, 2017, S244650, and *People v. Nachbar* (2016) 3 Cal.App.5th 1122 (*Nachbar*), review granted December 14, 2016, S238210.

Based on the persuasive value of this court's prior decisions (Cal. Rules of Court, rule 8.1115(e)), we conclude the condition is reasonable under *Lent* in light of Mancera's history of poor performance on probation and admitted drug use. We further conclude his "nexus" objection was insufficient to preserve an overbreadth challenge for appeal.

I. *Relevant Legal Principles*

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done' " (*People v. Moran* (2016) 1 Cal.5th 398, 402-403, quoting Pen. Code, § 1203.1, subd. (j).) "[A] sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public safety' " (*Moran*, at p. 403.) " 'If the defendant finds the conditions of probation more onerous than the sentence he would otherwise face, he may refuse probation' [citation] and simply 'choose to serve the sentence' [citation]." (*Ibid.*)

"The trial court's discretion [to impose probation conditions], although broad, nevertheless is not without limits" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) Under *Lent*, *supra*, 15 Cal.3d 481, " '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality" [Citation.]' " (*People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting *Lent*, at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.) We apply an abuse of discretion standard in reviewing the trial court's application of this test. (*Ibid.*)

In addition, " '[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] 'The essential

question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346; accord, *In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).)

Challenges to probation conditions ordinarily must be raised in the trial court; if they are not, appellate review of those conditions will be deemed forfeited. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235 (*Welch*).) However, a defendant who did not object to a probation condition at sentencing may raise a challenge to that condition on appeal if the defendant's appellate claim "amount[s] to a '*facial* challenge' " (italics added), i.e., a challenge that the "phrasing or language . . . is unconstitutionally vague and overbroad," and the determination whether the condition is constitutionally defective "does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Sheena K.*, *supra*, 40 Cal.4th at p. 885.)

II. *Lent* Challenge

The Attorney General argues the electronics-search condition is permissible solely on the basis of the third *Lent* prong—that the condition is " 'reasonably related to future criminality' " (*Lent*, *supra*, 15 Cal.3d at p. 486.) In *Trujillo*, *supra*, 15 Cal.App.5th at page 583, this court upheld the use of the same probation condition under the third *Lent* prong, based on the following framework:

"After *Lent*, the California Supreme Court clarified that a probation condition 'that enables a probation officer to supervise his or her charges effectively is . . . "reasonably related to future criminality." ' (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381, italics added; accord, *In re P.O.* (2016) 246 Cal.App.4th 288, 295 . . . (*P.O.*)). Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. (*Olguin*, at pp. 380-381; *People v. Balestra* (1999) 76 Cal.App.4th 57, 67 . . . (*Balestra*) ['a warrantless search condition is intended to ensure that the [probationer] is obeying the fundamental condition of all grants of probation, that is, the usual requirement . . . that a probationer "obey all laws" '].) "This is true "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted." ' (*P.O.*, at p. 295, quoting *Olguin*, at p. 380.)" (*Trujillo*, *supra*, 15 Cal.App.5th at p. 583, rev. gr.)

Applying this framework, we conclude the factual record supports the finding that the electronics-search condition is reasonably related to preventing Mancera's future criminality by enabling effective supervision. Mancera's criminal record includes multiple felony offenses (reckless evasion, unlawfully taking or driving a vehicle, and possession of a dirk or dagger). The probation report showed Mancera's demonstrated inability or refusal to comply with the terms of his prior probation grant—he admitted to using illegal drugs daily, he repeatedly failed to meet with his probation officer as directed, and he committed the instant offenses just months into his probationary sentence. The trial court was aware of these concerns when it imposed the electronics-search condition.

The trial court acted within its discretion in imposing the electronics-search condition. Because a defendant's use of electronic devices can provide important insight

into his daily activities, the court had a reasonable basis to permit warrantless searches of Mancera's electronics to provide the necessary supervision to ensure he abides by the law and his other probation conditions. Although the probation department could also supervise Mancera through face-to-face meetings, telephone conversations, and physical searches, the court could fairly conclude random electronic searches would provide an additional highly effective tool to deter Mancera from reoffending and ensure he remained law abiding. (See *Trujillo*, *supra*, 15 Cal.App.5th at pp. 582-584, rev. gr.; *In re P.O.* (2016) 246 Cal.App.4th 288, 295; see also *Olguin*, *supra*, 45 Cal.4th at p. 382.) These considerations are particularly relevant here, where Mancera has a demonstrated history of failing to comply with probation conditions. Thus, the electronics-search condition bears a sufficient nexus to the circumstances of Mancera's case.

We are aware Courts of Appeal have offered differing views about similar probation conditions. However, we think our opinion in *Trujillo* establishes an appropriate balance of the probationer's privacy interests and the need for adequate supervision of probationers such as Mancera. Pending further direction from our Supreme Court, we will adhere to the views expressed in *Trujillo*. As in that case, we find no abuse of discretion in the trial court's imposition of the electronics-search condition under the third *Lent* prong.

III. *Overbreadth Challenge*

Mancera forfeited his constitutional overbreadth challenge by failing to object on that basis during sentencing. (*Welch*, *supra*, 5 Cal.4th at pp. 234-235.) His "nexus" objection was sufficient to preserve his *Lent* challenge, but not an overbreadth challenge.

Lent and overbreadth challenges implicate different principles—a *Lent* challenge focuses on the reasonableness of the condition in light of the purposes of probation, whereas an overbreadth challenge focuses on the closeness of the fit between the legitimate purpose of the condition and the burden it imposes on the defendant's constitutional rights.

Mancera's nexus objection gave the trial court no indication he contended the scope of the condition was too broad. Had he objected on that basis, the court could have explored what electronic devices Mancera owns, what he stores on them, and how he uses them.

This would have allowed the court to tailor the breadth of the condition to the specifics of Mancera's case. His failure to object on this basis at sentencing deprived the court of the opportunity to conduct this analysis. Accordingly, he has forfeited his right to make an as-applied challenge on appeal to the breadth of the electronics-search condition. (See *People v. Smith* (2017) 8 Cal.App.5th 977, 985, 987 [*Lent* objection to password condition insufficient to preserve *Lent* and overbreadth challenges to "computers" and "electronics search functions" conditions].)

The exception to the forfeiture rule for facial challenges presenting pure questions of law does not apply because we cannot consider Mancera's challenge " 'without reference to the particular sentencing record developed in the trial court.' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 882.) Indeed, Mancera admits as much by arguing "[t]here is nothing in [his] past or current crimes or in his personal history that demonstrates a predisposition to use cell phones in connection with criminal activity." This is a quintessential as-applied challenge. To the extent Mancera makes a purely facial

challenge, it fails. Our court has previously upheld the scope of similar search provisions. (See, e.g., *Nachbar, supra*, 3 Cal.App.5th 1122, 1130, rev. gr.)

We are not persuaded by Mancera's contention that the forfeiture of his right to make an as-applied challenge resulted from ineffective assistance of counsel. "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212, citing *Strickland v. Washington* (1984) 466 U.S. 668, 694.) "If . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate court must reject the claim of ineffective assistance unless there can be no satisfactory explanation for counsel's conduct." (*People v. Kendrick* (2014) 226 Cal.App.4th 769, 778, fn. omitted (*Kendrick*).)

In *Kendrick, supra*, 226 Cal.App.4th 769, the appellate court rejected the defendant's claim that his trial counsel had performed ineffectively by failing to object to a probation condition that required probation approval before using the Internet. (*Id.* at p. 779.) The court reasoned that because "trial counsel had already negotiated an extremely favorable disposition for" the defendant, "trial counsel could have reasonably concluded that the trial court would not have entertained an objection to the probation condition. This is especially true since by that time case law had upheld Internet access conditioned on a probation officer's approval." (*Ibid.*)

Here, too, Mancera's trial counsel could reasonably have concluded the trial court would not have favorably entertained an objection to the scope of the electronics-search condition in light of the favorable plea bargain Mancera received and the fact our court has previously upheld similar conditions.

DISPOSITION

Affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.